No. 390

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

ROYAL M. BROADY,

Petitioner,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Edward J. Fruehtman
Richard P. Vett

Attorneys for Petitioner

COTTON, FRUEHTMAN & VETT
1943 Board of Trade Building
Chicago 4, Illinois
Of Counsel

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement of the Case	2
Reasons for Granting the Writ	5
Conclusion	9
Appendix A (pertinent sections of the Railway Labor Act, 45 U. S. C. Sections 151 et seq.)	10
Appendix B (Opinion of Attorney General Tom C. Clark, September 20, 1946, reported at 40 Ops. Atty. Gen. 494)	12

CASES

Elgin, J. & E. Ry. Co. v. Burley, 325 U. S. 711 (1945), affirmed on rehearing 327 U. S. 661 (1946)	6, 7, 8
Moore v. Illinois Central R. Co., 312 U. S. 630 (1941)	9
Order of Railway Conductors v. Southern Ry. Co., 339 U. S. 255 (1950)	8
Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239 (1950)	8, 9
Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U. S. 210	8

STATUTES

Judicial Code, § 24(8), 28 U. S. C. § 41(8)	8
Judicial Code, § 1254(1), 28 U. S. C. § 1254(1)	1
Railway Labor Act, Section 2 First, 45 U. S. C. § 152 First	8
Railway Labor Act, Section 2 Sixth, 45 U. S. C. § 152 Sixth	8
Railway Labor Act, Section 3 First (i), 45 U. S. C. § 153 First (i)	8
Railway Labor Act, Section 3 First (j), 45 U. S. C. § 153 First (j)	8

MISCELLANEOUS

40 Ops. Atty. Gen. 254 (1942)	6
40 Ops. Atty. Gen. 494 (1946)	6, 7

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled cause on July 25, 1951.

OPINIONS BELOW

The memorandum opinion of the District Court (R. 42-43)* is unreported.

The opinion of the Court of Appeals (Tr. 3) is reported at 191 F. 2d 73.

JURISDICTION

The judgment of the Court of Appeals was entered on July 25, 1951 (Tr. 4). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

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* Inasmuch as petitioner is submitting, with this petition, a motion for leave to dispense with the printing of the record and petition, the record filed herein consists of two parts: (1) the printed record in the Court of Appeals, referred to as "R."; and (2) the Transcript of Proceedings in the Court of Appeals, referred to as "Tr."

QUESTIONS PRESENTED

The question presented by the decision of the Court of Appeals is whether a federal district court, in the absence of diversity of citizenship, has jurisdiction of a railroad employee's claim for damages for wrongful discharge in violation of his right under the Railway Labor Act to representation of his own choice in conferring with the carrier on a personal grievance.

A resolution of this issue as to jurisdiction requires the determination of the following questions:

1. Whether a railroad employee against whom a carrier brings charges of misconduct has a right under the Railway Labor Act to confer with the carrier and to seek to resolve the grievance through a representative of his own choice.

2. If so, whether a collective agreement between the carrier and the certified bargaining agent may restrict the employee's statutory right to representation to employees of the carrier.

STATUTES INVOLVED

The questions presented involve the interpretation of certain provisions of the Railway Labor Act. 45 U.S.C. Section 151 et seq. The pertinent sections are reproduced in Appendix A, infra, pp. 10-11.

STATEMENT OF THE CASE

Petitioner, a dining car waiter, brought this suit in the United States District Court for the Northern District of Illinois under the Railway Labor Act, 45 U.S.C. Sections 151 et seq., alleging a wrongful discharge and praying damages,

reinstatement, and restoration of his seniority rights. As indicated below, the case in the Court of Appeals did not present questions involving reinstatement and restoration of seniority.

Petitioner's discharge arose from the following circumstances. During one of his runs, petitioner had an altercation with one or more passengers in the dining car. The facts are not clear, respondent claiming that petitioner was discourteous in violation of the railroad's rules of conduct (R. 21), and petitioner asserting that he refused to serve a passenger who had made improper reflections on his race (R. 33-34). As appears below, however, the merits as to whether petitioner violated the railroad's rules of conduct are not in issue here.

The dining car steward filed a complaint against petitioner with the office of respondent's general superintendent of dining service (R. 34). Thereafter, the superintendent of dining service, by a letter dated September 17, 1947, informed petitioner that he was charged with violating certain of the respondent's rules of conduct. The letter "directed" petitioner to be present, at a specified time and place, at a hearing to be held on the charges, and informed petitioner that he could be represented at the hearing only by "an employee" of the railroad (R. 10, 36-37).

Petitioner appeared at the designated time and place, accompanied by two persons chosen by him as his representatives (R. 11). Neither was an employee of the railroad (R. 11).

The railroad official conducting the hearing, learning that petitioner's representatives were not employees, informed petitioner that he could not be represented by any persons other than employees of respondent (R. 11, 30, 31). When

petitioner insisted upon the representatives he had chosen, the hearing officer advised petitioner that the hearing would not proceed unless petitioner's representatives left the room (R. 11, 30, 31). Petitioner, still insisting upon his right to representation of his own choice, left the room with his representatives (R. 12, 31).

On the following day respondent's superintendent of dining service notified petitioner that he was fired, not because of any violation of the railroad's rules of conduct, but solely because he had failed to attend the hearing referred to above (R. 12, 37).

The refusal of the hearing officer to permit petitioner to be represented by his own representatives was based upon provisions of a collective agreement between the respondent railroad and Local 351 of the Dining Car Employees Union, the certified bargaining agent for petitioner's craft (R. 11, 30, 31). This agreement provided that, in hearings of the kind referred to above, employees against whom charges had been made could be represented only by employees of the railroad (R. 40, 41). Petitioner was not a member of Local 351.

The district court, finding that petitioner had been wrongfully discharged in that he had been denied his statutory right to a representative of his own choosing, awarded damages in the amount of $9,224.67 plus costs (R. 54). The court refused to order petitioner's reinstatement and restoration of seniority rights. Petitioner did not appeal from such refusal.

Respondent appealed to the United States Court of Appeals for the Seventh Circuit, which reversed the judgment of the district court and remanded the cause with directions to dismiss the complaint (Tr. 4). The Court of Appeals rested its decision upon a determination that, in the absence of diversity of

citizenship, the district court had no jurisdiction of petitioner's action for wrongful discharge (Tr. 3).

REASONS FOR GRANTING THE WRIT

1. The basic issue presented is clearly of importance in the administration of the Railway Labor Act. Whether an employee with a personal grievance has a right to confer with the carrier through a representative of his own choice is a question which goes to the very heart of employee rights. If the employee has no such right, except to the extent he is granted one by the collective agreement between carrier and bargaining agent, then he may well be helpless at the crucial stage of grievance negotiation, i.e., the company level. To say, as does the Court of Appeals, that a railroad employee's right to representation does not arise until the carrier has taken action against him is tantamount to asserting that the employee is protected by the Railway Labor Act only when he ceases to be an employee.

Serious disputes which might disrupt commerce often arise from apparently trivial occurrences. Good labor relations as well as good common sense require that all disputes be resolved at the earliest possible stage. The Railway Labor Act provides machinery appropriate to that end. It would appear essential, therefore, that the employee involved in a personal dispute should not be hampered at the company level by restrictions which, once he has lost at that stage, are removed by the Railway Labor Act so that, presumably, he can give a proper account of himself at a subsequent stage. Otherwise disputes would be aggravated and prolonged, and opportunities for settlement at the company level missed.

That the question is of importance has been explicitly recognized by the National Mediation Board. In 1946 the Board asked the Attorney General for an opinion with respect to the very question presented here. Specifically the Board asked for a reconsideration, in light of the decisions of this Court in Elgin, J. & E. Ry. Co. v. Burley, 325 U. S. 711 (1945), affirmed on rehearing 327 U. S. 661 (1946), of an earlier opinion of the Attorney General, 40 Ops. Atty. Gen. 254 (1942), which held that in presenting a grievance to management an employee could do so only through such representative as the collective agreement between the carrier and the bargaining agent permitted.

Attorney General (now Mr. Justice) Clark revised the 1942 opinion and held that under the Burley decisions an aggrieved employee could negotiate "personally or through an individually chosen representative" for the settlement of his grievance. 40 Ops. Atty. Gen. 494 (1946), reproduced infra, page 12a as Appendix "B". The question has not been passed upon by this Court.

The importance of the issue is further demonstrated by the fact that briefs amici curiae were filed in the Court of Appeals on behalf of seventeen unions, with a combined membership of over 1,600,000, which represent for the purposes of collective bargaining the great majority of railroad employees in the United States. These briefs argued against the position urged by petitioner.

2. The decision of the Court of Appeals ignores the opinions of this Court in Elgin, J. & E. Ry. Co. v. Burley, 325 U. S. 711 (1945), affirmed on rehearing 327 U. S. 661 (1946), and is in fact in direct conflict with the principles enunciated in these opinions.

It is not without significance that the Court of Appeals failed to mention the Burley cases, which were argued at length by both parties and the amici curiae. For clearly the Court of Appeals could hardly discuss them without conceding that they rest upon a firm recognition of the rights of the individual employee, rights which might be limited only if a limitation be necessitated by some clear expression of Congressional purpose. Among the rights this Court had specifically in mind was the right to confer. 325 U. S. 711, 733-34. Basic to the right to confer is an unhampered right to representation.

The rationale of the Burley cases is that, within the area of labor relations involving the settlement of personal grievances unrelated to the interpretation of the collective agreement, the individual employee is free to chart his own course without let or hindrance from the collective agent. The Burley decisions construe the Act as guaranteeing to the individual employee, in so far as personal grievances are concerned, the power to choose his own representative, even to the exclusion of the collective agent, and to negotiate such grievances. The decision below, grounded on the premise that the Act confers no rights on the individual worker and that his rights, if any, are only those which stem from the collective agreement, is thus at war with the principles of Burley.

3. It is believed that the decision of the Court of Appeals is in error. What petitioners is asserting here is that under the Burley decisions an aggrieved railroad employee has a right to confer with the carrier through a representative of his own choice. This is the conclusion reached by Attorney General Clark in his opinion of September 20, 1946, 40 Ops. Atty. Gen. 494, reproduced herein as Appendix "B".

This view seems to be plainly foreshadowed by the language of this Court in the first Steele decision, 323 U. S. 711, 729 (1945):

> The questions of power to bargain concerning grievances, that is, to conclude agreements for their settlement, and to represent aggrieved employees in proceedings before the Board are not identical. But they obviously are closely related in the statutory scheme and in fact. If the collective agent has exclusive power to bargain, [illegible] and if necessary, a lawful grievance through [illegible] and to represent the employee [illegible] Accordingly it will be convenient to consider the two questions together. (Underscoring added.)

It likewise appears to be a conclusion required by the express terms of the Railway Labor Act, and particularly Section 2, First, Section 2, Sixth, and Section 3, First (i) and (j).

Such a right to confer through a freely-chosen representative, necessarily implied from the provisions of the Railway Labor Act, is one that the federal courts have jurisdiction to protect. Like Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210, 213 (1944), this case "is therefore one arising under a law regulating commerce of which the federal courts are given jurisdiction by 28 USCA § 41(8). . ."

The decisions relied upon by the Court of Appeals in holding that the district court was without jurisdiction are not in point. Both Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239 (1950), and Order of Railway Conductors v. Southern Ry. Co., 339 U. S. 255 (1950), held only that the jurisdiction of the National Railway Adjustment Board is exclusive in disputes between a carrier and a union involving the interpretation

of collective bargaining agreements. And in the Slocum case this Court took pains to point out that its decision was not inconsistent with Moore v. Illinois Central R. Co., 312 U. S. 630 (1941). Thus the Court wrote, 339 U. S. 239, 244 (1950):

> Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Edward J. Fruehtman

Edward J. Fruehtman

Richard F. Watt

Richard F. Watt

Attorneys for petitioner

Cotton, Fruehtman & Watt
1943 Board of Trade Building
Chicago 4, Illinois
Of Counsel

APPENDIX A

Railway Labor Act, 45 U. S. C. Sec. 151:

"Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or a group of carriers or by its or their employees to act for it or them."

Railway Labor Act, 45 U. S. C. Sec. 152:

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce * * *.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided with all expedition, by conferences between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. * * * the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time * * *

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place * * *.

"Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed, verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other expressed or implied agreements between them."

Railway Labor Act, 45 U. S. C. Sec. 153:

"First (i). The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

"First (j). Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them."

APPENDIX B

OPINION OF ATTORNEY GENERAL TOM C. CLARK RENDERED SEPTEMBER 20, 1946, REPORTED AT 40 OP. OF A. G. AT 494.

"The President:

"My Dear Mr. President: I have the honor to comply with your request of July 25, 1946, for my opinion on certain questions involving the Railway Labor Act, as amended (45 U. S. C. 151 ff.), submitted by the National Mediation Board.

"The Board wishes me to reconsider Attorney General Biddle's opinion of December 29, 1942 (40 Op. 254), in the light of the decision of the Supreme Court on June 11, 1945, in Elgin J. & E. Ry. Co. v. Burley, 325 U. S. 711, affirmed rehearing, March 25, 1946, 327 U. S. 661. In general, the problem presented concerns the respective rights, under the Railway Labor Act, of the individual employee and the collective representative of the employees, in the settlement with the employer of disputes over grievances as distinguished from disputes over the making or changing of collective bargaining agreements.[1]

"The 1942 opinion held that a carrier and a labor organization, duly designated to be the representative of a craft or class for the purposes of the act (section 2, Fourth, 45 U. S. C. 152), could lawfully include in a collective bargaining agreement a provision obligating both the carrier and the union to negotiate with each other, using the procedure specified in the contract, respecting the grievance of any employee in the craft or class (Op., supra, at pp. 3-5). The opinion in the Elgin case recognizes that the collective representative may have an interest in many grievance cases, and implies, though without deciding, that it would be entirely appropriate for the unit representative to be consulted in grievance cases (at pp. 737-738). There may, of course, be grievance cases in which the collective representative might have no interest. But it would be the best judge of that itself, and I see no objection to a contractual provision giving it the opportunity to participate in all grievance negotiations.

"The contract provision, as construed in the 1942 opinion, did not attempt to prevent an individual employee from also presenting his own grievance personally. As the opinion pointed out, the Railway Labor Act 'obviously contemplates that an employee may personally present his own grievance to the management' (Op., supra, at pp. 5-6). This ruling was expressly approved by the Supreme Court in the Elgin decision (at p. 735).

"The opinion stated, however, that under the statute and the rule prescribed in the agreement, the individual employee was precluded from presenting his grievance through any representative 'other than the representatives permitted by the collective bargaining agreement' (Op., supra, at p. 6). This

1. No question is raised with respect to the ruling that the Railway Labor Act prohibits an agreement conditioning employment on maintenance of union membership (Op., supra, pp. 1-3; see Elgin case, supra, p. 734 fn.).

position must be reconsidered in view of the Virginian decision. Upon the basis of the principles laid down by the Supreme Court in that case, I am convinced that the Railway Labor Act grants to the individual employee the right to prosecute his grievance personally or through any representative he may designate.

"The gist of the argument, that an individual employee could not press his grievance through a representative not sanctioned by the collective bargaining agreement, was that the settlement of grievances is an inseparable part of the collective bargaining process and that individual representation is inconsistent with the status and function of the collective bargaining representative (Op., supra, pp. 6-7). The Supreme Court recognized that 'there are points of common treatment' in the statute between 'disputes over grievances and disputes concerning the making of collective agreements.' The Court pointed out, specifically, that the 'collective agent' has an interest not only in the making of the collective agreement but also in 'the manner in which the agreement may be interpreted and applied;' that is, with respect to grievances (Virginian case, supra, at pp. 728, 733). Nevertheless, the Court concluded that 'it is clear from the act itself, from the history of railway labor disputes and from the legislative history of the various statutes which have dealt with them, that Congress has drawn major lines of difference between the two classes of controversy' (pp. 728-729). Because of this sharp distinction under the Railway Labor Act between disputes over the making of collective bargains and disputes over the settlement of grievances, the fact that the representative of the craft or class is the exclusive representative in the first kind of controversy (Virginian Ry. Co. v. System Federation, 300 U. S. 515, Virginian case, supra, p. 730) does not require the inference that exclusive representation must be granted in the second kind (cf. Virginian case, supra, pp. 728-731).

"The general scheme of the statute for the settlement of grievances as set forth by the Supreme Court in the Virginian decision, manifests an intention on the part of the Congress that an individual employee should have the right to press his grievance through a representative of his own choice. The act requires negotiation as the first step toward settlement of the grievance (45 U. S. C. 152). If negotiation fails to dispose of the controversy, each party may submit the matter to the National Railroad Adjustment Board which has jurisdiction to make awards in grievance cases (45 U. S. C. 153). These two stages 'are closely related in the statutory scheme and in fact.' If the individual employee has a right to participate in the proceeding before the Adjustment Board through a representative not sanctioned by the collective bargaining agreement, 'a strong inference, though not necessarily conclusive, would follow' for his right to such representation in the settlement of the grievance by negotiations with the carrier (Virginian case, supra, p. 729). Section 3, First, (j) of the act provides expressly that in Board proceedings—

"'Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect.' And the several divisions of the Adjustment Board must give due notice of all hearings to the employee or employees and the

carrier or carriers involved in any dispute submitted to them.' (45 U. S. C. 153) [Italics supplied.]

"Since the aggrieved employee is a separate party to the Board proceeding, it seems clear that the quoted section guarantees to him his own choice of representative in the proceeding (see Elgin case, supra, at pp. 734, 738, 746, on rehearing 327 U. S. 661). Accordingly, there is a 'strong inference' that the employee also has the statutory right to designate his own representative in the grievance negotiations with the carrier. The inference is strengthened by virtue of the fact that the employee can institute an action in court on his grievance, either to enforce an award of the Board (Elgin case, at p. 736) or in lieu of a submission to the Adjustment Board (Moore v. Illinois Central R. Co., 312 U. S. 630); of course, the employee would be entitled to act in these court proceedings through his own counsel.

"The legislative history cited in the first Elgin opinion also indicates an intent to preserve the aggrieved employee's right to confer with management about his own grievance through an individually chosen representative (Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7650, 73d Cong., 2d Sess., 44, 89; cf. Elgin case, supra, at p. 735).

"Moreover, section 2, Second, which obligates carriers and their employees to consider and, if possible, resolve 'all disputes' between them 'in conference,' provides that the conference shall be 'between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.' And Section 2, Sixth, provides specifically that grievance cases shall be handled in conference between 'the designated representatives' of the employees and the carriers. Further, section 2, Fourth, refers to management's conferring with 'an employee, individually, or local representatives of employees.' That the employees' 'representative of the craft or class' (see sec. 2, Fourth) is not the only kind of employee representative contemplated by the act is established in the Elgin opinion, as noted above. Similarly, the Court's ruling that the statute preserves the individual's interest in his grievances, as distinguished from the craft or class interest in them, has been noted. From the reasoning of the Court in the Elgin case it is necessarily implied that the representatives provided for by the above-quoted provisions of section 2, with respect to grievance negotiations, include the representative individually chosen by an aggrieved employee.

"This conclusion is re-enforced by the Court's reliance on section 3, First, (i) (45 U. S. C. 153). This clause requires grievance disputes to 'be handled in the usual manner up to and including the chief operating officer of the carrier.' Although most grievance cases were handled by the collective bargaining representative, the usual practice on the railroads prior to 1934 permitted individuals and minority unions to participate in negotiations with the carrier for their settlement; and collective bargaining agreements could not properly infringe on their right to do so (see Pennsylvania Federation v. Pennsylvania R. R. Co., 267 U. S. 203, 208, and materials collected in Brief for the U. S. as Amicus Curiae on Reargument, in Elgin case, supra, at pp. 7, 17, 48-52)."

"Finally, the Elgin decision holds squarely that a settlement of an individual employee's grievance will not be binding on him unless he has made or authorized the settlement (p. 741). It would, therefore, seem to be implied that the aggrieved employee may act in the matter through his own representative. Furthermore, the Court appears to state directly that an aggrieved employee has the statutory right to be represented in grievance negotiations with the carrier by an agent of his individual choice. Thus the Court's opinion contains the following language:

"'It follows that authority to concur in an agreement of settlement does not imply without more authority to represent the employee in Board proceedings, or the latter the former. This is true when the authority is given to the collective agent as it is when it is given to another.' (p. 746; see, also, pp. 733-734, 736, 738.) (Italics supplied.)

"It also appears clear from the Court's decision that the individuals' rights with respect to grievances cannot be eliminated by the collective contract:

"'The collective agreement could not be effective to deprive the employees of their individual rights. Otherwise these rights would be brought within the collective bargaining power by a mere exercise of that power, contrary to the purport and effect of the act as excepting them from its scope and reserving them to the individuals aggrieved. In view of that reservation the act clearly does not contemplate that the rights saved may be nullified merely by agreement between the carrier and the union.' (p. 744, also p. 740, ftn.).

"From what has been said above, it must be concluded that the collective agreement cannot legally restrict the individual employee as to the person he may designate as his representative for the settlement of his grievance. The statute guarantees his right to select the collective representative or a minority union or any other person otherwise qualified to act in this capacity.

"My conclusions may be summarized as follows: (1) the Elgin decision does not require reconsideration of the opinion expressed in 1942 that the collective bargaining representative has a sufficient interest in the disposition of grievances to validate, under the Railway Labor Act, a provision in the collective bargaining agreement obligating the carrier and the collective representative 'to confer and negotiate with each other, in an attempt to reach a settlement' of all grievances. (2) The agreement, however, under the decision of the Supreme Court in the Elgin case, cannot legally preclude an aggrieved employee from also negotiating with the carrier, personally or through an individually chosen representative, for the settlement of his grievance. He may designate as his representative the union holding the contract or any other union or person otherwise qualified to act. He may negotiate, personally or by representative, whether or not the collective representative determines to pursue the matter. And the settlement of the grievance, to be binding on the individual employee, must have been authorized by him.

"Respectfully yours,

"Tom C. Clark."

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

HERBERT J. DEANY,
Attorney for Respondent,
135 E. 11th Place,
Chicago 5, Ill.

JOSEPH H. WRIGHT,
CHARLES A. HELSELL,
JOHN W. FREELS,
135 E. 11th Place,
Chicago 5, Ill.,
Of Counsel.

THE BLAKELY-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement of the Case	3
Argument	7
I. The Decision of the Court of Appeals is clearly correct	7
II. There is no important question of Federal Law	10
III. There is no conflict of Decisions	12
Conclusion	15

CASES.

Brooks v. Chicago, R. I. & P. R. Co., 177 F. 2d 385 391 (8 C. A.)	12
Elgin, Joliet & Eastern Ry. Co. v. Burley, 325 U. S. 711	8, 13
Elgin, Joliet & Eastern Ry. Co. v. Burley, 327 U. S. 661	8, 13
Moore v. Illinois Central Railroad Company, 312 U. S. 630 (1941)	14
Order of Railway Conductors of America v. Southern Railway Company, 339 U. S. 255	14
Slocum v. Delaware L. & W. R. Co., 339 U. S. 239	14
Steele v. Louisville & Nashville R. R. Co., 323 U. S. 192	14
Texas & N. O. R. Co. v. Brotherhood of Railway Clerks, 281 U. S. 548	12
Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210	13, 14
Virginian Ry. v. System Federation No. 40, 300 U. S. 515, 559	9, 12

STATUTES.

Railway Labor Act, Section 1, Sixth (45 U. S. C. 151, Sixth) 8

Railway Labor Act, Section 1a, (45 U. S. C. 151a)..... 8

Railway Labor Act, Section 2, Second (45 U. S. C. 152, Second) 8

Railway Labor Act, Section 2, Third (45 U. S. C. 152, Third) 8

Railway Labor Act, Section 2, Eighth (45 U. S. C. 152, Eighth) 8

Railway Labor Act, Section 2, Ninth (45 U. S. C. 152, Ninth) 4

Railway Labor Act, Section 3, First (i) (45 U. S. C. 153, First (i))..... 6, 9, 14

Railway Labor Act, Section 3, First (j) (45 U. S. C. 153, First (j))..... 9

Railway Labor Act, Section 3, First (p) (45 U. S. C. 153, First (p))..... 9

MISCELLANEOUS.

Certificate of Dining Car Union, Local 351 as representative for purposes of Act..... 4

Collective Bargaining Agreement..... 4

Letter, Sept. 24, 1947, discharging Broady..... 5

Sec. (d) Article 25, Collective Bargaining Agreement.. 4

Sec. (e) Article 25, Collective Bargaining Agreement.. 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 390.

ROYAL M. BROADY,
Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The memorandum opinion of the District Court (R. 42-52)* is unreported.

The opinion of the Court of Appeals (Tr. 3) is reported at 191 F. 2d 73.

JURISDICTION.

Petitioner claims his action arises under the Railway Act 45 U. S. C. Section 151 *et seq.* and invokes the jurisdiction of this Court under 28 U. S. C. Section 1254 (1). Respondent contends that petitioner's claim, as held by the Court of Appeals (191 F. 2d at 76) is bottomed on the terms of a bargaining contract, not on a federal statute, and that the District Court was without jurisdiction.

* Respondent, like petitioner, will refer to the printed record in the Court of Appeals as "R" and to the transcript of proceedings in the Court of Appeals as "Tr.".

QUESTIONS PRESENTED.

The ultimate questions presented are:

1. Does the Railway Labor Act prescribe, apply to or control the procedure at an investigation conducted for the purpose of determining whether an employee of a railroad carrier is to be disciplined?

2. May a railroad carrier and its employees, through their respective representatives, in negotiating a collective bargaining contract granting to an employee a right to an investigation before dismissal, agree upon a binding and enforceable restriction to his co-employees of representation at the investigation hearing?

3. Does an action for alleged violation of rights arising not out of the Railway Labor Act, but out of the terms of a collective agreement, absent diversity of citizenship, present a justiciable controversy?

STATUTE INVOLVED.

Railway Labor Act, 45 U. S. C. Section 151 *et seq.* The pertinent provisions are set forth at pages 10-11 in appendix to petition.

STATEMENT OF THE CASE.

This litigation concerns the application, if any, of the Railway Labor Act to a disciplinary hearing at company level and to the procedure followed in the conduct of same. The parties hereto are residents and citizens of the State of Illinois. Royal M. Broady, the petitioner, is a former employee of the respondent, Illinois Central Railroad Company, carrier-employer. His work was that of a dining car waiter in interstate commerce, and the employment relationship falls within the purview of the Railway Labor Act, 45 U. S. C. Section 151 *et seq.* In September, 1947, after charges of violation of certain company rules were lodged against him, a disciplinary hearing was conducted by company officials, which resulted in his discharge.

An investigation or hearing of the kind with which this case is concerned is a proceeding conducted by the carrier-employer for the purpose of developing the facts from which may be determined whether and in what manner an employee has violated rules or instructions governing his conduct as an employee, and also whether discipline is to be imposed upon the employee, and if so, of what character and degree. Such an investigation is conducted by a qualified officer of the company, and statements of the witnesses are received ordinarily in question-and-answer form. Each employee charged with a rule violation is given his opportunity not only to be present in person, but also to be represented by some individual qualified under the applicable agreement to act in that capacity.

Investigations of this character, when required as a preliminary to and as the foundation of the imposition of

discipline, are provided for solely in the collective bargaining agreements—not in the Railway Labor Act. In the case of this plaintiff, the applicable agreement is that with the Dining Car Employees' Union, Local 351, Defendant's Exhibit No. 4 (R. 39-41). These investigations are governed entirely by the provisions of such agreements. They are required only when there is an agreement covering the employee under charges, and then only when the agreement specifically so provides.

In 1936 the services of the National Mediation Board were invoked pursuant to Section 2 Ninth of the Railway Labor Act (45 U. S. C., Section 152 Ninth), to settle a dispute as to who may properly represent dining car cooks, waiters, waiters in charge and buffet attendants, employees of the Illinois Central Railroad Company. Under date of February 4, 1937, that Board issued its certificate certifying that Dining Car Employees' Union, Local 351, of Chicago, Illinois, had been duly designated and authorized to represent the dining car cooks, waiters, waiters in charge and buffet attendants for the purpose of the Railway Labor Act (R. 17, Def. Ex. 3, R. 38).

Thereafter a collective bargaining agreement was negotiated between the Dining Car Employees' Union, Local 351, as the statutory representative of plaintiff's craft, and the Illinois Central Railroad Company. This agreement was effective November 16, 1937, as to rates of pay; December 1, 1937, as to pay rules; and December 18, 1937, as to years of service, seniority and other rules (R. 18, Def. Ex. 4, R. 38-41). Article 25 with reference to Discipline provided for an investigation or hearing as to any charges made, before dismissal or other disciplinary action. Sections (d) and (e) of Article 25 (R. 40-41) provided:

> "(d) Employees shall have the right to be present and may arrange, at their expense, to have an *em-*

*ployee** of their choice at hearings or investigations to hear the testimony, who may ask questions of the witnesses to bring out facts pertinent to the case. Employees shall also have the right to have present, at their expense, such witnesses as they desire to give testimony.

"(e) In case of censure, discipline or dismissal the employee or his representative may appeal to the Manager of Personnel or other officer designated by the Company, if he so desires, and if in case of dismissal it is found unjust, the employee shall be reinstated and paid for all time lost."

The charges against petitioner were occasioned by an altercation he had September 14, 1947, with certain passengers of respondent who were riding in the dining car and whom the petitioner refused to serve. The facts concerning notice, appearance of petitioner at the time and place scheduled for inquiry into validity of the charges, his claim of a right to be represented by certain individuals who accompanied him and who were not fellow employees, but officers of a labor organization other than the statutory collective bargaining representative (R. 11-12) sufficiently appear in the Petition at pages 3 and 4 and will not be here repeated. Upon the refusal of respondent to permit these individuals to represent petitioner, he declined to participate in the hearing and investigation which then proceeded in his absence. The following day, September 24, 1947, respondent addressed a letter to petitioner, advising him that he was discharged (Defendant's Exhibit 2, R. 37).

Since receipt of this letter petitioner has not been in the employ of respondent (R. 13). After receipt thereof he did participate in further meetings or conferences with a representative of the railroad, the next conference being with an attorney for the respondent, at which time he was

* All italics ours, except where otherwise indicated.

accompanied by Mr. Rothstein, an attorney, and the two union officials who appeared with him at the disciplinary hearing (R. 12-13). The record does not show that petitioner was suspended at any time prior to his discharge. No appeal was prosecuted by petitioner to the respondent's manager of personnel as authorized by Section (e) of Article 25 of the Collective Bargaining Agreement (Opinion 191 F. 2d 76), nor did he seek an adjudication of his alleged grievance because of his discharge and loss of seniority rights before the Adjustment Board as provided for in the Railway Labor Act, Section 153 First (i).

Petitioner brought this action based upon the Railway Labor Act for alleged wrongful discharge. He asked for reinstatement, restoration of seniority rights and lost wages. In a non-jury trial the District Court held petitioner had a statutory right to designate a representative of his own choosing, other than a co-employee, to represent him at a company disciplinary hearing,—a right denied him. Judgment was entered against the respondent for $9,224.67 and costs. On appeal the Court of Appeals held that the District Court was without jurisdiction, reversed the judgment and ordered the cause remanded with directions to dismiss the complaint.

ARGUMENT.

The issue in this case is an extremely simple one, and no amount of strained semantics can convert it into one warranting review by this court on certiorari. It presents a dispute as to whether there was a denial of petitioner's alleged *statutory* right to have his designated representative act for him at a disciplinary hearing at company level.

Petitioner claimed his statutory right to a representative of his own choice at such hearing under the Railway Labor Act. Respondent claims that the said statute does not give the petitioner such right; that his right to representation at, or for that matter his right to have a hearing of any character whatsoever before discharge is not an inherent right. It did not exist at common law. It was not created by the Railway Labor Act and there is no foundation for it in the contract of employment. It is the respondent's contention that the right to any disciplinary investigation at company level and before discharge was created by and rests solely upon the Collective Bargaining Agreement between the respondent company and Dining Car Employees' Union, Local 351, as the representative under the Railway Labor Act of the petitioner's craft.

I.

The Decision of the Court of Appeals is Clearly Correct.

The District Court decided (memo. op. R. 51) that under the Railway Labor Act the petitioner has a *statutory* right to a representative of his own choosing and that respondent violated that Act when it restricted the petitioner in the

choice of his representation to those who were employees of the respondent.

In support of its decision the said court quoted the following sections from the Railway Labor Act, 45 U. S. C. 151-163: Section 151 Sixth; Section 151 (a) (cited in the opinion as Section 152); Section 152 Second; Section 152 Third; Section 152 Eighth; and the decision of the United States Supreme Court in *Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 325 U. S. 711; affirmed on rehearing, 327 U. S. 661.

Neither in the findings of fact (R. 52), conclusions of law (R. 54), nor in the memorandum opinion did the Trial Court point out any specific language or any particular section of the Act which supports the court's conclusion that there is such a *statutory* right to unrestricted choice of representation at a company disciplinary hearing. The obvious reason for this is that there is no such right. This was one of the principal, if not the controlling issue in the case, and the fact that the Court of Appeals considered that issue and correctly decided same is clearly evidenced in its opinion (191 F. 2d 73) at page 76, wherein it is said:

> "We can find no provision of the Railway Labor Act which gives to employees the right to a representative of their own choice at an investigation by company officials of a charge that the employee has violated company rules. In the case at bar, appellee's right to representation comes from the agreement of appellant and Dining Car Employees Union, Local 351."

It was and is the position of respondent that petitioner had no grievance until he was actually dismissed, the day after the investigation. Until then he had not even been suspended. Not only did the investigation precede the initial existence of the grievance, but in fact it was held

for the particular purpose of determining the facts; and to see whether disciplinary action would be taken which might result in a grievance. When that disciplinary action was taken on September 24, 1947, but not before that date, petitioner was in a position to assert his grievance claim, in substance that he had been unjustly discharged and therefore should be reinstated and paid for time lost. In considering this issue the court after quoting sub-paragraphs (i), (j), and (p) 45 U. S. C. 153, First, stated at page 77:

> "It appears to us under the above provisions of the Railway Labor Act that the employee's right to representation thereunder, when an investigation of a breach of company rules is involved, would arise only when the officials of the company have completed their inquiry and entered a finding unsatisfactory to the accused employee. Then, and only then, is he entitled under the Act itself, to a hearing before the Adjustment Board."

Further evidencing the correctness of the decision of the Court of Appeals is the holding in *Virginian Railway Company* v. *Federation*, 300 U. S. 515, 559 (op. 191, F. 2d 73) "that the provisions of the Railway Labor Act do not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them."

In addition to thus treating and correctly deciding the basic issue of petitioner's case, the opinion further holds that because of the exclusive jurisdiction of the National Railway Adjustment Board, the District Court lacked jurisdiction in so far as petitioner sought reinstatement and back pay. This holding is based on the express terms of Section 3(i) of the Railway Labor Act and the opinions in *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239 and *Order of Railway Conductors of America* v. *Southern Railway Company*, 339 U. S. 255, and is particularly applicable

here in the light of the court's necessary finding that the right to any hearing at company level is based upon the collective bargaining contract rather than the terms of the statute.

The court further holds that even if the suit be considered as seeking only damages for wrongful discharge, petitioner's action must be treated as arising under contract only, and in the absence of diversity of citizenship the Federal District Court would have no jurisdiction.

II.

There Is No Important Question of Federal Law.

Petitioner asserts (petn. p. 5) that the basic issue presented is clearly of importance in the administration of the Railway Labor Act. This new-born interest in the administration of the Act is refreshing, though tardy. Petitioner's actions throughout have indicated a studied purpose to avoid the machinery set up for the administration of the Act to accomplish his desires.

Petitioner further states "whether an employee with a personal grievance has the right to confer with the carrier through a representative of his own choice is a question which goes to the very heart of employee rights," but there is no issue in this case as to the right of petitioner to confer with the respondent carrier. The respondent never questioned that right and that right was not denied petitioner (R. 12-13). As to personal grievance, the petitioner had no grievance until his discharge.

So much has been said in decisions under the Railway Labor Act about its exclusive applicability to railroad labor controversies that it is understandable why the trial court tried to find the answer to this controversy in the provisions of that act. Admittedly the act does contain a

provision allowing an employee to have a representative of his own selection (either employee or non-employee) in a hearing before the National Railroad Adjustment Board. This right is unquestioned. But that provision is wholly inapplicable to the present litigation. First, because the hearing was not before the Adjustment Board; second, no controversy had yet arisen. The hearing was solely for the purpose of ascertaining the facts concerning the incident on the train. The result might well have been, if the facts so justified, a complete exoneration of plaintiff.

The Railway Labor Act, broad as it is in its scope, does not attempt to limit the employer's authority in investigating the conduct of his employees. Until the investigation is completed and the employer has taken some action of which the employee complains, there is no controversy under the act. That this is true, that it is so entirely proper and in accordance with immemorial custom and practice, is so obvious it is difficult to understand how it escaped the trial court's attention. Perhaps it was natural to look to the federal act for the answer. But the error lies in attempting to apply the act before any controversy arose,—to a disciplinary hearing, which, it is true, might have resulted in a controversy but had not. It is unthinkable that an employer can not conduct an investigation of an employee's conduct without outside interference. Surely the employee is amply protected if he is given the right to non-employee representation *after there has been a decision against him.* This is the protection accorded employees in every collective bargaining agreement negotiated uniformly by all the crafts. If the employees acting through their bargaining agents are satisfied, there is no occasion for courts to read something into the federal act which is not there, nor to amend the collective agreement by deleting a provision satisfactory to the representatives of every union on every railroad.

Petitioner says the importance of the issue is illustrated by the filing of briefs *amici curiae* on behalf of seventeen unions with a combined membership of over 1,600,000. Petitioner also refers to the recognition of the importance of the question by the National Mediation Board. No effort was made by the National Mediation Board to appear in the cause as *amici curia.* The fact that the briefs *amici curiae* filed in the case opposed the position taken by petitioner and represented "the great majority of railroad employees in the United States" indicates the important phase of this litigation is to make sure that nothing is read into the Railway Labor Act which is not plainly there.

III.

There Is No Conflict of Decisions.

Except for this particular case in which the Court of Appeals disagreed with the District Court, we are not aware of any conflict of decisions on the issues here presented.

In holding that the provisions of the Railway Labor Act do not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them, the decision is entirely consistent with and followed *Virginian Railway Company* v. *System Federation, No. 40,* 300 U. S. 515, and *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548.

The decision is also in harmony and complete accord with the decision of the Court of Appeals of 8th circuit in *Brooks* v. *Chicago R. I. & P. R. Co.,* 177 F. 2d 385, wherein the court said on page 391:

> "The Railway Labor Act does not empower the courts to enforce against railroads *any prescribed procedure*

for investigating and discharging its employees, nor does it empower the courts to entertain original actions to compel railroads to re-employ or give back pay to discharged employees. * * *"

Petitioner urges (petn. p. 6) that the decision ignores the opinions of this court in *Elgin J. & E. Ry. Co.* v. *Burley,* 325 U. S. 711 (1945) affirmed on rehearing 327 U. S. 661 (1946) and is inconsistent therewith.

The *Burley* decisions did not involve a disciplinary hearing conducted by an employer. The question there was the extent of the authority of the officers of the bargaining representative to bind individuals in the adjustment and settlement of accrued individual pecuniary claims—not in a disciplinary hearing or in conference with officers of the carrier on a matter that had not as yet reached a grievance state—but in proceedings before the *National Railroad Adjustment Board.*

Petitioner says (petn., p. 7):

> "It is not without significance that the Court of Appeals failed to mention the *Burley* cases, which were argued at length by both parties and the *amici curiae.*"

It is true that respondent and *amici curiae* argued in their briefs the *Burley* cases in the Court of Appeals. The argument was that the *Burley* cases have no application to the issues in this case. The significance of the failure of the opinion to refer to the opinions in the *Burley* cases is that the Court of Appeals agreed with our arguments.

At page 8 petitioner cites *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen,* 323 U. S. 210, and particularly page 213 thereof, reading in part:

> "* * * is therefore one arising under a law regulating commerce of which the federal courts are given jurisdiction by 28 U. S. C. A. Section 41(8). * * *"

In support of the argument that "Such a right to confer through a freely-chosen representative, necessarily implied from the provisions of the Railway Labor Act, is one that the federal courts have jurisdiction to protect." In the *Tunstall* case, like the case of *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, on which it relies, the question was whether the Railway Labor Act imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representative of a craft, the duty to represent all the employees in the craft without discrimination because of their race, and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation. The collective bargaining representatives under the Act were parties defendants (in fact the principal defendants) to the *Steele* and *Tunstall* cases. Petitioner's representative is not a party defendant here. As stated in the *Steele* case:

> "Section 3, First (i), which provides for reference to the Adjustment Board of 'disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements,' makes no reference to *disputes between employees and their representative.*"

The *Tunstall* case does not aid the petitioner.

Petitioner argues that *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239, and *Order of Railway Conductors of America* v. *Southern Railway Co.*, 339 U. S. 255, relied upon by the Court of Appeals in holding that the District Court was without jurisdiction are not in point. But for the reasons given by that Court of Appeals in its opinion at page 78, we think they are in point.

Finally petitioner urges (p. 9) that the decision is inconsistent with *Moore* v. *Illinois Central Railroad Company*, 312 U. S. 630 (1941). This contention was urged in and considered by the Court of Appeals as is shown by the statement in the opinion at page 78:

"But it must be remembered that in the *Moore* case there was diversity of citizenship. *That was the basis of federal jurisdiction in that case.*"

Conclusion.

For the foregoing reasons it is respectfully submitted, that this petition for a writ of certiorari should be denied.

HERBERT J. DEANY,
Attorney for Respondent,
135 E. 11th Place,
Chicago 5, Ill.

JOSEPH H. WRIGHT,
CHARLES A. HELSELL,
JOHN W. FREELS,
135 E. 11th Place,
Chicago 5, Ill.,
Of Counsel.